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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES, PETITIONER,
v.
WILLIAM B. POLAND AND FREDERICK WILLIAM LOW.
No. 29.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This case presents for review a judgment of the Circuit Court of Appeals for the Ninth Circuit affirming a judgment of the District Court for the Third Division of Alaska dismissing on demurrer a bill filed by the Government to cancel one of two patents issued to William B. Poland on two entries made simultaneously, each embracing 160 acres made by use of soldiers' additional homestead rights, the two aggregating 320 contiguous acres.

The bill, with the exhibits, showed that William B. Poland was the assignee of the unlocated and unentered soldiers' additional homestead rights, acquired from four different parties.

On April 26, 1906, Poland filed at the Juneau, Alaska, land office, simultaneously, two applications, one based on the soldiers' additional homestead rights of two of his assignors, the other on the like rights of the remaining two assignors.

By one application he sought to enter a tract designated as survey No. 241, covering 159.25 acres; by the other, a tract designated as survey No. 242, containing 160 acres. Defendant Poland filed, or caused to be filed, in support of his application for a patent to survey No. 242, an affidavit stating that the land applied for did not exceed 160 acres in extent, fronts less than 160 rods along the shore of any navigable water, and is more than 80 rods distant from any other survey or entry, under the provisions of the act of May 14, 1898 (30 Stat. 409), as amended by the act of March 3, 1903 (32 Stat. 1028). Patents were issued to Poland as follows: For survey No. 241 on January 20, 1908, and for survey No. 242 on March 22, 1909.

The bill alleged that the patent covering survey No. 242 had been obtained by fraud because the allegation in this affidavit that the land covered by survey No. 242 was more than 80 rods distant from any other survey or entry was false, and that the entry was in violation of the express prohibition contained in the act of March 3, 1903, against the location in a single body of more than 160 acres by the use of soldiers' additional homestead rights (R. 4–6).

The defendant Low is made a party as the purchaser of the land in controversy from the patentee, Poland.

Defendants demurred generally to said bill (R. 13, 14). The district court sustained said demurrers, holding substantially that the prohibition of the statute related to the *entry* of more than 160 acres of land in a single body under one application, and that inasmuch as not more than 160 acres was contained in survey No. 242, the entry was not in contravention of law, notwithstanding the fact that it was immediately contiguous to the land embraced in survey No. 241 (R. 14, 23), and was applied for and entered at the same time by the same person. The Circuit Court of Appeals by a divided court (Judge Rudkin dissenting, R. 40) affirmed this judgment (R. 34). The majority held that the limitation in the act of March 3, 1903, restricting the area to be acquired under soldiers' additional homestead rights applied only where the entry lay along the shore of any navigable water. That the bill as originally passed by the House and the Senate did not contain this limitation; that it was added in conference committee; and that as under established parliamentary law a conference committee is not authorized to consider matters not incorporated in the bill as passed by the two Houses of Congress, unless those matters are germane to someting already in the bill, this addition must be construed as relating to the restriction on location along the shore of a navigable water. (Opin-

ion of District Court, R. 14; opinion of Circuit Court of Appeals, R. 34; 231 Fed. 810.)

Assignments of Error.

The assignments of error state that the court erred in dismissing the bill of complaint (R. 25, 26).

Specification of Errors.

The Government contends:

1. The prohibition of the act is so clear as not to permit limitation by construction or interpretation.

2. That the act, properly construed, prohibits the acquisition of more than 160 acres in a single body by the use of soldiers' additional homestead rights, regardless of location or the number of assigned rights presented by the defendant.

3. That the construction of the statute has been followed by the Land Department, is sustained by the history of such legislation as evidencing the congressional intent, and will be persuasive with this court.

4. That the construction of the statute here complained of disregards and renders unnecessary the first proviso of said act.

5. That the affidavit that No. 242 was 80 rods distant from any other survey or entry under the acts of Congress was misleading to the public officers on the question whether more than 160 acres were being entered by Poland in a single body.

I.

ARGUMENT.

Where the language of the act is unambiguous and clear, the obvious meaning controls, and construction or interpretation limiting the same is not permissible.

That part of the act of March 3, 1903 (32 Stat. 1028), material here, is as follows:

> That all the provisions of the homestead laws of the United States not in conflict with the provisions of this act, and all rights incident thereto, are hereby extended to the district of Alaska, subject to such regulations as may be made by the Secretary of the Interior; and no indemnity, deficiency, or lieu-land selections pertaining to any land grant outside of the district of Alaska shall be made, and no land scrip or land warrant of any kind whatsoever shall be located within or exercised upon any lands in said district except as now provided by law: *And provided further*, That no more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right: *And provided further*, That no location of scrip, selection, or right along any navigable or other waters shall be made within the distance of eighty rods of any lands, along such waters, theretofore located by means of any such scrip or otherwise: *And provided further*, That no commutation privileges shall be allowed in excess of one hundred and sixty acres included in any homestead entry under the provisions hereof: *Provided*, That no entry shall be allowed extending more

than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims; and that nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district; and no patent shall issue hereunder until all the requirements of sections twenty-two hundred and ninety-one, twenty-two hundred and ninety-two, and twenty-three hundred and five of the Revised Statutes of the United States have been fully complied with as to residence, improvements, cultivation, and proof, except as to commuted lands as herein provided: *And it is further provided*, That every person who is qualified under existing laws to make homestead entry of the public lands of the United States who has settled upon or who shall hereafter settle upon any of the public lands of the United States situated in the district of Alaska, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall, subject to the provisions and limitations hereof, be entitled to enter three hundred and twenty acres or a less quantity of unappropriated public land in said district of Alaska.

The portion of the act particularly important is the proviso "That no more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right."

We contend that the language of this proviso is so plain, certain, and unambiguous as to make limitation thereof by construction erroneous. It is well settled that where the legislative intent is plain and the language is without ambiguity, there is no ground for judicial construction, and that a statute will be enforced according to its obvious meaning. This doctrine has been reiterated often by this court. A few of the later cases are: *United States* v. *First National Bank* (234 U. S. 245, 258); *Mackenzie* v. *Hare* (239 U. S. 299, 307, 308); and *Caminetti* v. *United States* (242 U. S. 470, 485–490).

The opinion in the *Caminetti* case thus states the rule (p. 485):

> It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. *Lake County* v. *Rollins*, 130 U. S. 662, 670, 671; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 33; *United States* v. *Lexington Mill and Elevator Co.*, 232 U. S. 399, 409; *United States* v. *Bank*, 234 U. S. 245, 258.
>
> Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion. *Hamilton* v. *Rathbone*, 175 U. S. 414, 421.

II.

The language of the act is clear in its restriction of the acreage to be acquired in a single body, by the use of scrip, lieu-selection or soldiers' additional homestead rights.

In the portion of the act of March 3, 1903, relevant to this case, there are five provisos. They provide:

> (1) That no more than 160 acres shall be entered in a single body by such scrip, lieu selection or soldiers' additional homestead right.
>
> (2) No location of scrip, selection or right along any navigable or other water shall be made within the distance of 80 rods of any lands along such water, theretofore located by means of any such scrip or otherwise.
>
> (3) No commutation privileges shall be allowed in excess of 160 acres included in any homestead entry under the provisions hereof.
>
> (4) No entry shall be allowed extending more than 160 rods along the shore of any navigable water, and along such shore a space of at least 80 rods shall be reserved from entry between all such claims, and nothing herein contained shall be so construed as to authorize entries to be made or title acquired to the shore of any navigable water within said district. (The remaining portion relates to other matters not important here.)
>
> (5) Every person who is qualified under existing laws to make homestead entry of the public lands of the United States who has settled upon or shall hereafter settle upon any of the public lands . . . situated in the

> district of Alaska . . . with the intention of claiming the same under the homestead laws shall . . . be entitled to enter 320 acres or a less quantity of unappropriated public lands in said district of Alaska.

It is quite clear that the subject matter of the provisos (1) and (5) (our numbers) relate to different subjects.

No. (1) restricts the acreage to be acquired in a single body by the use of scrip, lieu selection, or soldier's additional homestead rights.

One contrasting incident to these several rights and the homestead right spoken of in No. (5) is that scrip, lieu selection, and soldiers' additional rights require no residence to perfect the same. They are an asset like a chose in action, and are subject to sale and assignment at pleasure. No duty of residence or improvement rests on either assignor or assignee. (*Webster* v. *Luther*, 163 U. S. 331, 337, 339, 341.)

The proviso (5) relates solely to a homestead right to be perfected by residence, cultivation, and improvements required of homestead settlers by the homestead laws.

Taking the remaining parts of the statute, the language in proviso (1) is not that "no entry" shall be made containing more than 160 acres. It is "no more than 160 acres shall be entered *in a single body*."

An entry might well be construed to be the "right of entry" of each claimant. This definition is not applicable to the proviso.

The difference of language in this act of 1903 and the former act of May 14, 1898 (30 Stat. 409), is significant. The former act reads "No *entry* (italics ours) shall be allowed extending more than 80 rods along the shore," etc. The present act reads, "No more than 160 acres shall be entered in a single body by such scrip, lieu selection, and soldiers' additional homestead right."

Each soldier, under additional homestead right, would be entitled only to the difference between his original homestead and 160 acres. Each separate claim would therefore be less than 160 acres. (Rev. Stats., sec. 2306.)

These rights were assignable at will, and claims calling for much more than 160 acres in the aggregate could well become the property of one assignee.

Language similar to that inserted in proviso (1) had not existed in the statutes regulating these matters before the act of March 3, 1903. (See dissenting opinion of Rudkin, J., in this case reviewing previous legislation, R. 40–42.)

The conclusion seems to be inevitable that the purpose of this act and the provisos is—

First. To extend to Alaska the homestead system of the United States.

Second. To provide that a *settler* might acquire an original homestead not exceeding 320 acres on complying with the laws as to residence upon the homestead, etc., as contained in said statutes.

No commutation privileges shall be allowed in excess of 160 acres included in any homestead entry under the provisions of the statute.

Third. That persons seeking to enter lands under scrip, lieu selection, or soldiers' additional homestead rights (such persons not being required by law to reside upon, cultivate, or improve the lands), can not by means of such scrip have more than 160 acres of land entered in a single body; that whether this is attempted by one or two entries (so called) is immaterial.

Fourth. That no patents shall issue until all requirements of law are complied with.

Fifth. That no location by scrip, selection, or right shall be made along the shore of any water within 80 rods of any other located lands along said water.

Sixth. That no entry shall be allowed extending more than 160 rods along the shore; that at least 80 rods along such shore shall be kept free from entry between such claims; that entries of the shore can not be made, or title to such shore acquired.

The District Court placed stress upon the word "entered" in the proviso. The court overlooked the fact that "an entry" is not the thing prohibited, but is that "more than 160 acres shall not be entered in a single body" by the use of scrip, etc. It is clear from the entire proviso that what was aimed at was the prevention of the *acquisition* through soldiers' additional homestead rights of more than 160 acres in a

single body, and not an entry under each separate right without regard to the acreage in a single body which one person might thus acquire.

The District Court in its opinion undertakes to draw an analogy between the provisions here under discussion and the United States Mining Law (R. 16). Under the latter, "*no such location* [placer] *shall include* more than twenty acres for each individual claimant" (R. S. 2331), but "two or more persons, or associations of persons, having contiguous claim of any size * * * may make joint entry thereof, *but no location of a placer claim* * * * *shall exceed* one hundred and sixty acres for any one person or association of persons." (R. S. 2330.) (Italics supplied.)

The District Court points out that such provisions have never restricted a person or association of persons from making two locations immediately adjoining, and holds that the "same reasoning would apply to one case as to another." (R. 16.)

There perhaps would be justification for this view if the provision of law applicable in the instant case read, "No entry under such scrip, lieu selection or soldier's additional homestead right shall exceed one hundred and sixty acres," thus following the provisions of the placer mining law.

But the language under consideration does not follow those provisions. Instead, it provides "that no more than one hundred and sixty acres shall be entered in any single body by such scrip," etc.

By contrast, the difference in meaning is obvious. It is apparent that the provision was designed to prevent the very thing the District Court holds that it sanctions.

This statute did not seek to restrict the right of an individual to more than one claim, but only to prevent an individual from holding more than 160 acres in a single body under scrip, lieu selection, or soldier's additional homestead right.

The argument that it would be useless to provide that not more than 160 acres of land shall be entered in a single body under scrip, etc., if two such locations adjoining each other could be entered and patented, is met in the opinion of the District Court by another reference to placer mining locations.

The court asks why such locations should be limited to 160 acres when two or more may be entered by the same locators notwithstanding the fact that they adjoin each other, and answers this question by stating that a limitation must be made somewhere and that it was probably placed "at 160 acres as being a reasonable area to be included in one location, the presumption being that the additional expense of locating, surveying and other expenses attendant upon holding and patenting the grant will operate as a check on excessive locating or patenting by one individual or association." (R. 16.)

It is apparently overlooked that discovery is made a prerequisite to a mineral location (R. S., 2320, 2329), which requirement of necessity operates as a limita-

tion on the amount of land which such discovery entitles a claimant to locate, whilst in the case of homestead lands acquired under soldier's additional homestead right, the acreage that can be entered thereunder is fixed by the instrument itself before entry is made.

The theory of the District Court is that the two tracts were separate and distinct bodies of land under our system of land measurement. Presumably, the court considered that the imaginary and arbitrary line between the two surveys constituted sufficient separation of the land to exclude them from the inhibition against the acquisition of land in a single body in excess of 160 acres.

It is inconceivable that Congress intended such a construction to be placed on the term "single body," for the provision thus construed would be applicable to no lands other than those contained in the unsurveyed portion of the public domain in Alaska, and, even when so applied, the terms of the provision could be circumvented, as in this case, by causing an official survey to be made (R. 3) before making application to enter the land. Moreover, this construction of the provision would have placed Congress in the position of prohibiting the doing of an act directly, which by indirection it intended to allow.

Since the language of the statute is plain, it was not necessary for the Circuit Court of Appeals to take into consideration the legislative history of the bill as it passed the two houses of Congress, to ascer-

tain the intention of Congress with respect to it. There being no ambiguity or uncertainty in the language of the statute, construction is not permissible.

III.

Even if it be conceded that the language of the statute requires construction, we invoke the rule that due weight should be given to the rulings of the Land Department. These rulings have uniformly been to the effect that the acquisition of land in Alaska by use of soldiers' additional scrip is limited to 160 acres in a single body.

In Circular of Instructions (32 L. D. 424, 426), it was stated:

> The amendatory act does not specifically reenact that portion of the act of 1898 which granted the right to enter *unsurveyed* lands in the district of Alaska under the provisions of law relating to the acquisition of title through soldiers' additional rights, but it is provided thereby "that no more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right," which seems to negative any intention to modify or repeal the existing law with regard to the exercise of such rights in the district of Alaska further than to limit the amount which may be entered in a single body to 160 acres. Further, that portion of the amendatory act which provides that "no indemnity, deficiency, or lieu-land selections pertaining to any land grant outside of the district of Alaska shall be made, and no land scrip or land warrant of

> any kind whatsoever shall be located within or exercised upon any lands in said district, except as now provided by law," seems to recognize that there are some such outstanding rights; but, unless soldiers' additional homestead rights are thereby considered as scrip rights, this Department is not advised as to any other law permitting the exercise of any such rights in the district of Alaska. You will therefore continue to receive soldiers' additional homestead applications under sections 2306 and 2307, Revised Statutes, as heretofore, bearing in mind the limitation that not more than 160 acres can be taken in a single body.

In circular dated July 7, 1913 (42 L. D. 213, 214), the following occurs:

> No more than 160 acres shall be entered in any single body by scrip, land warrant, or soldiers' additional right in any part of the District of Alaska, and between any of such claims aggregating more than 160 acres there must be a space of 80 rods.

There are no reported decisions of the Land Department involving this proviso, but there are several decisions of the General Land Office unreported that are in accord with what we understand to be its plain meaning. These rulings and decisions of the executive department charged with its administration are entitled to respect and should be given weight by the courts in considering the statute.

This rule is well stated in *United States* v. *Hammers* (221 U. S. 220) as follows (pp. 228, 229):

> Conceding then that the statute is ambiguous, we must turn as a help to its meaning, indeed in such case, as determining its meaning, to the practice of the officers whose duty it was to construe and administer it. They may have been consulted as to its provisions, may have suggested them, indeed have written them. At any rate their practice, almost coincident with its enactment, and the rights which have been acquired under the practice, make it determinately persuasive.

The history of the legislation which resulted in this enactment will be found to support the construction which is contended for by the Government. The Circuit Court of Appeals, in the majority opinion, gives a correct statement of what transpired while the bill was being considered by Congress, but the history thus given is not complete. As first introduced in and passed by the House, the bill provided only for raising the acreage which might be acquired in Alaska under the homestead law from 80 to 320 acres. (H. R. 778, 57th Cong., 1st sess. on H. R. 12098.) See also Congressional Record, volume 36, part I, Fifty-seventh Congress, second session, page 81, which contains the brief discussion of the bill in the House and indicates that only the ordinary homestead entry was considered. When the bill was presented to the Senate Committee on Public Lands, an amendment was made to it which practically was

a rewriting of the bill. An important provision in this amendment was that excepting from the provisions of the bill the allowance of acquisition of title by soldiers' additional homestead rights, and the following specific mention was made of that provision in the Senate (Rept. No. 2755, 57th Cong., 2d sess.):

> Third. All this land is, by the operation of this proposed bill, taken out of the operation of the law which allows the entry of land of like character in the United States and Territories by means of the various classes of land scrip which may now be applied to that purpose.

It passed the Senate in substantially the form presented by the committee (Cong. Rec., vol. 36, pt. 2, pp. 1679–1681, 2028). After the bill went to conference on the nonconcurrence by the House in the Senate amendments, and the insistence by the Senate upon its amendments, the bill was reported by the conferees with amendments, one of them being the proviso against the acquisition of more than 160 acres in a single body under the soldiers' additional homestead rights. In submitting this report to the House, the House conferees made a statement (Cong. Rec., vol. 36, pt. 3, p. 2859, 57th Cong., 2d sess.), the first paragraph of which is as follows:

> The Senate provision prohibiting the use of soldiers' additional homestead rights in Alaska is stricken out, leaving the existing law, and

> also limiting the use of all scrip or lieu selections to tracts of not exceeding 160 acres, and reserving from such locations along navigable or other waters tracts of not less than 80 rods in width between such entries.

From the foregoing it is clearly apparent that the intention of Congress in adopting this amendment was to prohibit the acquisition of more than 160 acres in a single body by means of soldiers' additional homestead rights.

The point made by the Circuit Court of Appeals that under parliamentary law Congress could not put into a bill a provision which was not germane to that already in it, is not important here. That was solely a point of parliamentary practice upon which, on a point of order, the clause as written might have been objectionable. An amendment not germane to a bill is bad on a point of order, but if enacted as a part of the bill is as valid and is to be considered as any other portion of the statute.

The construction given to the language of the first proviso of the act of March 3, 1903, rests upon the supposed presumption that the Congress would not violate the rule prohibiting the insertion of new matter not germane to a provision in one or the other of the conflicting bills. In the first place, it is not clear that the proviso is not germane to that provision of the Senate bill which excepted from its provisions the right to acquire lands in Alaska by means of soldiers' additional homestead scrip. Granting, however, that the proviso was not ger-

mane to any provision in either of the bills, the presumption that the conferees had not violated the rule referred to is a very slender reed to lean upon. The rule referred to has been habitually violated, a fact that recently led to an extended discussion in the Senate. Among other things said about the rule on that occasion are the following (57 Cong. Rec., pp. 5620, 5622):

> It [meaning a conference report] has the right of way; it has a supreme legislative prerogative; it sets aside whatever the Senate is considering; and here is the troublesome thing about it: It may be brought up for immediate consideration by the Senate. It need not be printed; it need not have appeared in type form; it may be 40 pages long; it may deal with everything vital to the future life of the people of this country, regarding heat, light, and power. It may be as important as that; and yet, under the rules, it has the right to brush aside all pending legislation when it first comes into the Senate, and be read from the desk, and the demand made that we proceed to consider and pass upon it.
>
> * * * * *
>
> Mr. La Follette. Suppose a conference report comes in here, like this report, of 20 or 30 pages. It comes in under a privilege that does not require it to be printed. When it is presented it can be read from the desk, and Senators have to sit there and by their ears judge whether new matter has been put in by the conferees or not. What protection is that?

As Judge Rudkin in his dissenting opinion said, it is immaterial how the proviso got into the act; it is sufficient that it is there and was enacted deliberately by Congress. It clearly was put into the bill by way of compromise, the House yielding in its position against the proposition in the bill as passed by the Senate prohibiting entirely the use of soldiers' additional rights in Alaska, and the Senate yielding to the extent of allowing such acquisition within the limitation expressed as to acreage. Such compromises by conferees in attempting to settle differences between the two Houses with respect to proposed legislation are not unusual but are common.

IV.

The construction making the first proviso applicable only to lands lying along navigable water does violence to its plain terms, and involves holding, in effect, that it is superfluous.

The Circuit Court of Appeals is of the opinion that "what the statute was seeking to protect was the shores of the navigable waters of Alaska, and not to prohibit the entry of a tract of land more than 160 acres and not more than 320 acres elsewhere than along the shore." (R. 36.) Granted that this was one of the purposes of the statute, it is clear that such purpose was fulfilled by other provisions (Nos. 2 and 4, our numbers) without the aid of the first proviso, the obvious purpose of which is simply to prevent the acquisition of more than 160 acres in

any single body under scrip, lieu selection, or soldier's additional homestead right. It could have no other purpose, if it is to be given any meaning at all.

The court held that the limitation of 160 acres placed upon the acreage which could be acquired by soldiers' additional rights had application only where the land sought to be entered lay along navigable waters. If this construction be correct, it follows that the proviso was also purposeless for the following reasons:

The act of May 14, 1898 (30 Stat. 409), of which the act of March 3, 1903 (32 Stat. 1028), is an amendment, provided:

> That the homestead land laws of the United States and the rights incident thereto, including the right to enter surveyed or unsurveyed lands under provisions of law relating to the acquisition of title through soldiers' additional homestead rights, are hereby extended to the District of Alaska, subject to such regulations as may be made by the Secretary of the Interior; * * * *Provided*, That no entry shall be allowed extending more than eighty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims * * *.

The fourth proviso in the act of March 3, 1903, contained the exact language of the proviso in the act of 1898, which is quoted above, except that it allowed an entry to extend along navigable water

160 instead of 80 rods, as in the former act. The Land Department had held under the 1898 act that all entries, whether ordinary homestead or otherwise, were limited to 80 rods along the shore of any navigable water. (Regulations concerning entries, rights of way, timber, etc., Alaska, June 8, 1898; 27 L. D. 248, particularly par. 5, p. 249.) The Land Department having construed the act of 1898 to limit the acquisition of soldiers' additional rights along navigable waters to 80 rods, it is both fair and logical to say that under the fourth proviso of the act of 1903 it would have limited such entries to 160 rods along navigable waters. Congress must be presumed to have legislated with knowledge of the departmental holdings with respect to the acquisition of lands in Alaska. This being so, it follows that proviso No. (1) would be wholly unnecessary if limited to each entry and not to the acreage which could be entered in a single body by the use of soldiers' additional homestead right, etc., and if the sole purpose was to limit the proviso here under consideration to lands lying along navigable waters, and also if the sole thing in the mind of Congress was to prevent a monopolization of the water front, instead of a restriction on the use to be made of such soldier's additional homestead rights, as well as prohibiting all use of them as proposed.

The same is true of the construction of the proviso given by the district court, which appeared to find the word "entered" a stumblingblock to the Gov-

ernment's maintaining the suit. Under the Land Department construction of the act of May 14, 1898, all entries, soldiers' additional or other, were limited to 80 acres in area. (Instructions of June 8, 1898, 27 L. D. 248, particularly par. 6, p. 249; Instructions of December 4, 1902, Secretary of the Interior to Commissioner of the General Land Office, 31 L. D. 441, 442.)

If the word "entered" was intended to be considered in the narrow meaning given it by the district court, Congress need not have enacted the proviso, for any number of entries contiguous to each other away from the shore could have been made under the 1898 act, provided only each individual entry did not exceed 80 acres. There would scarcely be any point in limiting the area under each entry and it certainly would serve no purpose; nor would it have any relevancy to the proposition which was before the Senate and House conferees, namely, whether the use of soldiers' additional rights should be prohibited entirely as to lands in Alaska.

It is clear from the terms of the proviso itself, as well as in the light of the situation, both as to previous legislation and construction by the Land Department, and also in view of the legislative history of the 1903 act, that Congress meant to limit the acquisition of lands under soldiers' additional rights to 160 acres in a single body in Alaska, regardless of whether or not the entry bordered on navigable

water or arose under one or more claims of right presented by a single holder.

The affidavit that survey No. 242 was 80 rods distant from any other survey or entry under said act of Congress was misleading to the public officer in determining whether more than 160 acres were being entered by Poland in a single body. Assuming that the statute prohibited more than 160 acres being located in a single body by one person, by means of more than one application filed simultaneously based on separate assignments, this affidavit made a false statement to the public officer. It in effect stated that these tracts did not constitute a single body.

It stated as to No. 242 that it was 80 rods away from any other survey or entry applied for under said act, when it adjoined No. 241 being then applied for under said act.

Even if the separation of 80 rods was not required between these two tracts to protect the water front, as the court below decides, the affidavit asserted the separation of survey No. 242 from all other surveys and thus asserted a compliance with the limitation on the extent of single bodies permitted to be entered by the use of soldiers' additional homestead rights.

As pointed out by the dissenting opinion, this statement, if false, was a fraud on the officials; if innocent, it was a mistake of fact.

CONCLUSION.

It is respectfully submitted that the decision dismissing the bill of complaint should be reversed and the case sent back for further proceedings thereunder.

ALEXANDER C. KING,
Solicitor General.

FRANK K. NEBEKER,
Assistant Attorney General.

○

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No. 29

In the Supreme Court of the United States

OCTOBER TERM, 1919

THE UNITED STATES, PETITIONER,

v.

WILLIAM B. POLAND AND FREDERIC WILLIAM LOW

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF WILLIAM B. POLAND AND FREDERICK WILLIAM LOW

THE ARGUS PRESS, SEATTLE

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BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This case presents for review a judgment of the Circuit Court of Appeals for the Ninth Circuit affirming a judgment of the District Court for the Third Division of Alaska dismissing on demurrer a bill filed by the Government to cancel one of two patents issued to William B. Poland on two entries made simultaneously, each embracing 160 acres made by use of soldiers' additional homestead rights, the two aggregating 320 contiguous acres.

The bill, with the exhibits, showed that William B. Poland was the assignee of the unlocated and unentered soldiers' additional homestead rights, acquired from four different parties.

On April 26, 1906, Poland filed at the Juneau, Alaska, land office, simultaneously, two applications, one based on the soldiers' additional homestead rights of two of his assignors, the other on the like rights of the remaining two assignors.

By one application he sought to enter a tract designated as survey No. 241, covering 159.25 acres; by the other, a tract designated as survey No. 242, containing 160 acres. Defendant Poland filed, or caused to be filed, in support of his application for a patent to survey No. 242, an affidavit stating that the land applied for did not exceed 160 acres in extent, fronts less than 160 rods along the shore of any navigable water, and is more than 80 rods distant from any other survey or entry, under the provisions of the act of May 14, 1898 (30 Stat. 409), as amended by the act of March 3, 1903 (32 Stat. 1028). Patents were issued to Poland as follows: For survey No. 241 on January 20, 1908, and for survey No. 242 on March 22, 1909.

The bill alleged that the patent covering survey No. 242 had been obtained by fraud because the allegation in this affidavit that the land covered by survey No. 242 was more than 80 rods distant from any other survey or entry was false, and that the entry was in violation of the express prohibition contained in the act of March 3, 1903, against the location in a single body of more than 160 acres by the use of soldiers' additional homestead rights (R. 4–6).

The defendant Low is made a party as the purchaser of the land in controversy from the patentee, Poland.

Defendants demurred generally to said bill (R. 13, 14). The district court sustained said demurrers, holding substantially that the prohibition of the statute related to the *entry* of more than 160 acres of land in a single body under one application, and that inasmuch as not more than 160 acres was contained in survey No. 242, the entry was not in contravention of law, notwithstanding the fact that it was immediately contiguous to the land embraced in survey No. 241 (R. 14, 23), and was applied for and entered at the same time by the same person. The Circuit Court of Appeals by a divided court (Judge Rudkin dissenting, R. 40) affirmed this judgment (R. 34). The majority held that the limitation in the act of March 3, 1903, restricting the area to be acquired under soldiers' additional homestead rights applied only where the entry lay along the shore of any navigable water. That the bill as originally passed by the House and the Senate did not contain this limitation; that it was added in conference committee; and that as under established parliamentary law a conference committee is not authorized to consider matters not incorporated in the bill as passed by the two Houses of Congress, unless those matters are germane to someting already in the bill, this addition must be construed as relating to the restriction on location along the shore of a navigable water. (Opin-

ion of District Court, R. 14; opinion of Circuit Court of Appeals, R. 34; 231 Fed. 810.)

Assignments of Error.

The assignments of error state that the court erred in dismissing the bill of complaint (R. 25, 26).

Specification of Errors.

The Government contends:

1. The prohibition of the act is so clear as not to permit limitation by construction or interpretation.

2. That the act, properly construed, prohibits the acquisition of more than 160 acres in a single body by the use of soldiers' additional homestead rights, regardless of location or the number of assigned rights presented by the defendant.

3. That the construction of the statute has been followed by the Land Department, is sustained by the history of such legislation as evidencing the congressional intent, and will be persuasive with this court.

4. That the construction of the statute here complained of disregards and renders unnecessary the first proviso of said act.

5. That the affidavit that No. 242 was 80 rods distant from any other survey or entry under the acts of Congress was misleading to the public officers on the question whether more than 160 acres were being entered by Poland in a single body.

I.

ARGUMENT.

Where the language of the act is unambiguous and clear, the obvious meaning controls, and construction or interpretation limiting the same is not permissible.

That part of the act of March 3, 1903 (32 Stat. 1028), material here, is as follows:

> That all the provisions of the homestead laws of the United States not in conflict with the provisions of this act, and all rights incident thereto, are hereby extended to the district of Alaska, subject to such regulations as may be made by the Secretary of the Interior; and no indemnity, deficiency, or lieu-land selections pertaining to any land grant outside of the district of Alaska shall be made, and no land scrip or land warrant of any kind whatsoever shall be located within or exercised upon any lands in said district except as now provided by law: *And provided further*, That no more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right: *And provided further*, That no location of scrip, selection, or right along any navigable or other waters shall be made within the distance of eighty rods of any lands, along such waters, theretofore located by means of any such scrip or otherwise: *And provided further*, That no commutation privileges shall be allowed in excess of one hundred and sixty acres included in any homestead entry under the provisions hereof: *Provided*, That no entry shall be allowed extending more

than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims; and that nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district; and no patent shall issue hereunder until all the requirements of sections twenty-two hundred and ninety-one, twenty-two hundred and ninety-two, and twenty-three hundred and five of the Revised Statutes of the United States have been fully complied with as to residence, improvements, cultivation, and proof, except as to commuted lands as herein provided: *And it is further provided*, That every person who is qualified under existing laws to make homestead entry of the public lands of the United States who has settled upon or who shall hereafter settle upon any of the public lands of the United States situated in the district of Alaska, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall, subject to the provisions and limitations hereof, be entitled to enter three hundred and twenty acres or a less quantity of unappropriated public land in said district of Alaska.

The portion of the act particularly important is the proviso "That no more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right."

We contend that the language of this proviso is so plain, certain, and unambiguous as to make limitation thereof by construction erroneous. It is well settled that where the legislative intent is plain and the language is without ambiguity, there is no ground for judicial construction, and that a statute will be enforced according to its obvious meaning. This doctrine has been reiterated often by this court. A few of the later cases are: *United States* v. *First National Bank* (234 U. S. 245, 258); *Mackenzie* v. *Hare* (239 U. S. 299, 307, 308); and *Caminetti* v. *United States* (242 U. S. 470, 485–490).

The opinion in the *Caminetti* case thus states the rule (p. 485):

> It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. *Lake County* v. *Rollins*, 130 U. S. 662, 670, 671; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 33; *United States* v. *Lexington Mill and Elevator Co.*, 232 U. S. 399, 409; *United States* v. *Bank*, 234 U. S. 245, 258.
>
> Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion. *Hamilton* v. *Rathbone*, 175 U. S. 414, 421.

II.

The language of the act is clear in its restriction of the acreage to be acquired in a single body, by the use of scrip, lieu-selection or soldiers' additional homestead rights.

In the portion of the act of March 3, 1903, relevant to this case, there are five provisos. They provide:

> (1) That no more than 160 acres shall be entered in a single body by such scrip, lieu selection or soldiers' additional homestead right.
>
> (2) No location of scrip, selection or right along any navigable or other water shall be made within the distance of 80 rods of any lands along such water, theretofore located by means of any such scrip or otherwise.
>
> (3) No commutation privileges shall be allowed in excess of 160 acres included in any homestead entry under the provisions hereof.
>
> (4) No entry shall be allowed extending more than 160 rods along the shore of any navigable water, and along such shore a space of at least 80 rods shall be reserved from entry between all such claims, and nothing herein contained shall be so construed as to authorize entries to be made or title acquired to the shore of any navigable water within said district. (The remaining portion relates to other matters not important here.)
>
> (5) Every person who is qualified under existing laws to make homestead entry of the public lands of the United States who has settled upon or shall hereafter settle upon any of the public lands . . . situated in the

> district of Alaska . . . with the intention of claiming the same under the homestead laws shall . . . be entitled to enter 320 acres or a less quantity of unappropriated public lands in said district of Alaska.

It is quite clear that the subject matter of the provisos (1) and (5) (our numbers) relate to different subjects.

No. (1) restricts the acreage to be acquired in a single body by the use of scrip, lieu selection, or soldier's additional homestead rights.

One contrasting incident to these several rights and the homestead right spoken of in No. (5) is that scrip, lieu selection, and soldiers' additional rights require no residence to perfect the same. They are an asset like a chose in action, and are subject to sale and assignment at pleasure. No duty of residence or improvement rests on either assignor or assignee. (*Webster* v. *Luther*, 163 U. S. 331, 337, 339, 341.)

The proviso (5) relates solely to a homestead right to be perfected by residence, cultivation, and improvements required of homestead settlers by the homestead laws.

Taking the remaining parts of the statute, the language in proviso (1) is not that "no entry" shall be made containing more than 160 acres. It is "no more than 160 acres shall be entered *in a single body.*"

An entry might well be construed to be the "right of entry" of each claimant. This definition is not applicable to the proviso.

The difference of language in this act of 1903 and the former act of May 14, 1898 (30 Stat. 409), is significant. The former act reads "No *entry* (italics ours) shall be allowed extending more than 80 rods along the shore," etc. The present act reads, "No more than 160 acres shall be entered in a single body by such scrip, lieu selection, and soldiers' additional homestead right."

Each soldier, under additional homestead right, would be entitled only to the difference between his original homestead and 160 acres. Each separate claim would therefore be less than 160 acres. (Rev. Stats., sec. 2306.)

These rights were assignable at will, and claims calling for much more than 160 acres in the aggregate could well become the property of one assignee.

Language similar to that inserted in proviso (1) had not existed in the statutes regulating these matters before the act of March 3, 1903. (See dissenting opinion of Rudkin, J., in this case reviewing previous legislation, R. 40–42.)

The conclusion seems to be inevitable that the purpose of this act and the provisos is—

First. To extend to Alaska the homestead system of the United States.

Second. To provide that a *settler* might acquire an original homestead not exceeding 320 acres on complying with the laws as to residence upon the homestead, etc., as contained in said statutes.

No commutation privileges shall be allowed in excess of 160 acres included in any homestead entry under the provisions of the statute.

Third. That persons seeking to enter lands under scrip, lieu selection, or soldiers' additional homestead rights (such persons not being required by law to reside upon, cultivate, or improve the lands), can not by means of such scrip have more than 160 acres of land entered in a single body; that whether this is attempted by one or two entries (so called) is immaterial.

Fourth. That no patents shall issue until all requirements of law are complied with.

Fifth. That no location by scrip, selection, or right shall be made along the shore of any water within 80 rods of any other located lands along said water.

Sixth. That no entry shall be allowed extending more than 160 rods along the shore; that at least 80 rods along such shore shall be kept free from entry between such claims; that entries of the shore can not be made, or title to such shore acquired.

The District Court placed stress upon the word "entered" in the proviso. The court overlooked the fact that "an entry" is not the thing prohibited, but is that "more than 160 acres shall not be entered in a single body" by the use of scrip, etc. It is clear from the entire proviso that what was aimed at was the prevention of the *acquisition* through soldiers' additional homestead rights of more than 160 acres in a

single body, and not an entry under each separate right without regard to the acreage in a single body which one person might thus acquire.

The District Court in its opinion undertakes to draw an analogy between the provisions here under discussion and the United States Mining Law (R. 16). Under the latter, "*no such location* [placer] *shall include* more than twenty acres for each individual claimant" (R. S. 2331), but "two or more persons, or associations of persons, having contiguous claim of any size * * * may make joint entry thereof, *but no location of a placer claim* * * * *shall exceed* one hundred and sixty acres for any one person or association of persons." (R. S. 2330.) (Italics supplied.)

The District Court points out that such provisions have never restricted a person or association of persons from making two locations immediately adjoining, and holds that the "same reasoning would apply to one case as to another." (R. 16.)

There perhaps would be justification for this view if the provision of law applicable in the instant case read, "No entry under such scrip, lieu selection or soldier's additional homestead right shall exceed one hundred and sixty acres," thus following the provisions of the placer mining law.

But the language under consideration does not follow those provisions. Instead, it provides "that no more than one hundred and sixty acres shall be entered in any single body by such scrip," etc.

By contrast, the difference in meaning is obvious. It is apparent that the provision was designed to prevent the very thing the District Court holds that it sanctions.

This statute did not seek to restrict the right of an individual to more than one claim, but only to prevent an individual from holding more than 160 acres in a single body under scrip, lieu selection, or soldier's additional homestead right.

The argument that it would be useless to provide that not more than 160 acres of land shall be entered in a single body under scrip, etc., if two such locations adjoining each other could be entered and patented, is met in the opinion of the District Court by another reference to placer mining locations.

The court asks why such locations should be limited to 160 acres when two or more may be entered by the same locators notwithstanding the fact that they adjoin each other, and answers this question by stating that a limitation must be made somewhere and that it was probably placed "at 160 acres as being a reasonable area to be included in one location, the presumption being that the additional expense of locating, surveying and other expenses attendant upon holding and patenting the grant will operate as a check on excessive locating or patenting by one individual or association." (R. 16.)

It is apparently overlooked that discovery is made a prerequisite to a mineral location (R. S., 2320, 2329), which requirement of necessity operates as a limita-

tion on the amount of land which such discovery entitles a claimant to locate, whilst in the case of homestead lands acquired under soldier's additional homestead right, the acreage that can be entered thereunder is fixed by the instrument itself before entry is made.

The theory of the District Court is that the two tracts were separate and distinct bodies of land under our system of land measurement. Presumably, the court considered that the imaginary and arbitrary line between the two surveys constituted sufficient separation of the land to exclude them from the inhibition against the acquisition of land in a single body in excess of 160 acres.

It is inconceivable that Congress intended such a construction to be placed on the term "single body," for the provision thus construed would be applicable to no lands other than those contained in the unsurveyed portion of the public domain in Alaska, and, even when so applied, the terms of the provision could be circumvented, as in this case, by causing an official survey to be made (R. 3) before making application to enter the land. Moreover, this construction of the provision would have placed Congress in the position of prohibiting the doing of an act directly, which by indirection it intended to allow.

Since the language of the statute is plain, it was not necessary for the Circuit Court of Appeals to take into consideration the legislative history of the bill as it passed the two houses of Congress, to ascer-

tain the intention of Congress with respect to it. There being no ambiguity or uncertainty in the language of the statute, construction is not permissible.

III.

Even if it be conceded that the language of the statute requires construction, we invoke the rule that due weight should be given to the rulings of the Land Department. These rulings have uniformly been to the effect that the acquisition of land in Alaska by use of soldiers' additional scrip is limited to 160 acres in a single body.

In Circular of Instructions (32 L. D. 424, 426), it was stated:

> The amendatory act does not specifically reenact that portion of the act of 1898 which granted the right to enter *unsurveyed* lands in the district of Alaska under the provisions of law relating to the acquisition of title through soldiers' additional rights, but it is provided thereby "that no more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right," which seems to negative any intention to modify or repeal the existing law with regard to the exercise of such rights in the district of Alaska further than to limit the amount which may be entered in a single body to 160 acres. Further, that portion of the amendatory act which provides that "no indemnity, deficiency, or lieu-land selections pertaining to any land grant outside of the district of Alaska shall be made, and no land scrip or land warrant of

> any kind whatsoever shall be located within or exercised upon any lands in said district, except as now provided by law," seems to recognize that there are some such outstanding rights; but, unless soldiers' additional homestead rights are thereby considered as scrip rights, this Department is not advised as to any other law permitting the exercise of any such rights in the district of Alaska. You will therefore continue to receive soldiers' additional homestead applications under sections 2306 and 2307, Revised Statutes, as heretofore, bearing in mind the limitation that not more than 160 acres can be taken in a single body.

In circular dated July 7, 1913 (42 L. D. 213, 214), the following occurs:

> No more than 160 acres shall be entered in any single body by scrip, land warrant, or soldiers' additional right in any part of the District of Alaska, and between any of such claims aggregating more than 160 acres there must be a space of 80 rods.

There are no reported decisions of the Land Department involving this proviso, but there are several decisions of the General Land Office unreported that are in accord with what we understand to be its plain meaning. These rulings and decisions of the executive department charged with its administration are entitled to respect and should be given weight by the courts in considering the statute.

This rule is well stated in *United States* v. *Hammers* (221 U. S. 220) as follows (pp. 228, 229):

> Conceding then that the statute is ambiguous, we must turn as a help to its meaning, indeed in such case, as determining its meaning, to the practice of the officers whose duty it was to construe and administer it. They may have been consulted as to its provisions, may have suggested them, indeed have written them. At any rate their practice, almost coincident with its enactment, and the rights which have been acquired under the practice, make it determinately persuasive.

The history of the legislation which resulted in this enactment will be found to support the construction which is contended for by the Government. The Circuit Court of Appeals, in the majority opinion, gives a correct statement of what transpired while the bill was being considered by Congress, but the history thus given is not complete. As first introduced in and passed by the House, the bill provided only for raising the acreage which might be acquired in Alaska under the homestead law from 80 to 320 acres. (H. R. 778, 57th Cong., 1st sess. on H. R. 12098.) See also Congressional Record, volume 36, part I, Fifty-seventh Congress, second session, page 81, which contains the brief discussion of the bill in the House and indicates that only the ordinary homestead entry was considered. When the bill was presented to the Senate Committee on Public Lands, an amendment was made to it which practically was

a rewriting of the bill. An important provision in this amendment was that excepting from the provisions of the bill the allowance of acquisition of title by soldiers' additional homestead rights, and the following specific mention was made of that provision in the Senate (Rept. No. 2755, 57th Cong., 2d sess.):

> Third. All this land is, by the operation of this proposed bill, taken out of the operation of the law which allows the entry of land of like character in the United States and Territories by means of the various classes of land scrip which may now be applied to that purpose.

It passed the Senate in substantially the form presented by the committee (Cong. Rec., vol. 36, pt. 2, pp. 1679–1681, 2028). After the bill went to conference on the nonconcurrence by the House in the Senate amendments, and the insistence by the Senate upon its amendments, the bill was reported by the conferees with amendments, one of them being the proviso against the acquisition of more than 160 acres in a single body under the soldiers' additional homestead rights. In submitting this report to the House, the House conferees made a statement (Cong. Rec., vol. 36, pt. 3, p. 2859, 57th Cong., 2d sess.), the first paragraph of which is as follows:

> The Senate provision prohibiting the use of soldiers' additional homestead rights in Alaska is stricken out, leaving the existing law, and

> also limiting the use of all scrip or lieu selections to tracts of not exceeding 160 acres, and reserving from such locations along navigable or other waters tracts of not less than 80 rods in width between such entries.

From the foregoing it is clearly apparent that the intention of Congress in adopting this amendment was to prohibit the acquisition of more than 160 acres in a single body by means of soldiers' additional homestead rights.

The point made by the Circuit Court of Appeals that under parliamentary law Congress could not put into a bill a provision which was not germane to that already in it, is not important here. That was solely a point of parliamentary practice upon which, on a point of order, the clause as written might have been objectionable. An amendment not germane to a bill is bad on a point of order, but if enacted as a part of the bill is as valid and is to be considered as any other portion of the statute.

The construction given to the language of the first proviso of the act of March 3, 1903, rests upon the supposed presumption that the Congress would not violate the rule prohibiting the insertion of new matter not germane to a provision in one or the other of the conflicting bills. In the first place, it is not clear that the proviso is not germane to that provision of the Senate bill which excepted from its provisions the right to acquire lands in Alaska by means of soldiers' additional homestead scrip. Granting, however, that the proviso was not ger-

mane to any provision in either of the bills, the presumption that the conferees had not violated the rule referred to is a very slender reed to lean upon. The rule referred to has been habitually violated, a fact that recently led to an extended discussion in the Senate. Among other things said about the rule on that occasion are the following (57 Cong. Rec., pp. 5620, 5622):

> It [meaning a conference report] has the right of way; it has a supreme legislative prerogative; it sets aside whatever the Senate is considering; and here is the troublesome thing about it: It may be brought up for immediate consideration by the Senate. It need not be printed; it need not have appeared in type form; it may be 40 pages long; it may deal with everything vital to the future life of the people of this country, regarding heat, light, and power. It may be as important as that; and yet, under the rules, it has the right to brush aside all pending legislation when it first comes into the Senate, and be read from the desk, and the demand made that we proceed to consider and pass upon it.
>
> * * * * *
>
> Mr. La Follette. Suppose a conference report comes in here, like this report, of 20 or 30 pages. It comes in under a privilege that does not require it to be printed. When it is presented it can be read from the desk, and Senators have to sit there and by their ears judge whether new matter has been put in by the conferees or not. What protection is that?

As Judge Rudkin in his dissenting opinion said, it is immaterial how the proviso got into the act; it is sufficient that it is there and was enacted deliberately by Congress. It clearly was put into the bill by way of compromise, the House yielding in its position against the proposition in the bill as passed by the Senate prohibiting entirely the use of soldiers' additional rights in Alaska, and the Senate yielding to the extent of allowing such acquisition within the limitation expressed as to acreage. Such compromises by conferees in attempting to settle differences between the two Houses with respect to proposed legislation are not unusual but are common.

IV.

The construction making the first proviso applicable only to lands lying along navigable water does violence to its plain terms, and involves holding, in effect, that it is superfluous.

The Circuit Court of Appeals is of the opinion that "what the statute was seeking to protect was the shores of the navigable waters of Alaska, and not to prohibit the entry of a tract of land more than 160 acres and not more than 320 acres elsewhere than along the shore." (R. 36.) Granted that this was one of the purposes of the statute, it is clear that such purpose was fulfilled by other provisions (Nos. 2 and 4, our numbers) without the aid of the first proviso, the obvious purpose of which is simply to prevent the acquisition of more than 160 acres in

any single body under scrip, lieu selection, or soldier's additional homestead right. It could have no other purpose, if it is to be given any meaning at all.

The court held that the limitation of 160 acres placed upon the acreage which could be acquired by soldiers' additional rights had application only where the land sought to be entered lay along navigable waters. If this construction be correct, it follows that the proviso was also purposeless for the following reasons:

The act of May 14, 1898 (30 Stat. 409), of which the act of March 3, 1903 (32 Stat. 1028), is an amendment, provided:

> That the homestead land laws of the United States and the rights incident thereto, including the right to enter surveyed or unsurveyed lands under provisions of law relating to the acquisition of title through soldiers' additional homestead rights, are hereby extended to the District of Alaska, subject to such regulations as may be made by the Secretary of the Interior; * * * *Provided*, That no entry shall be allowed extending more than eighty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims * * *.

The fourth proviso in the act of March 3, 1903, contained the exact language of the proviso in the act of 1898, which is quoted above, except that it allowed an entry to extend along navigable water

160 instead of 80 rods, as in the former act. The Land Department had held under the 1898 act that all entries, whether ordinary homestead or otherwise, were limited to 80 rods along the shore of any navigable water. (Regulations concerning entries, rights of way, timber, etc., Alaska, June 8, 1898; 27 L. D. 248, particularly par. 5, p. 249.) The Land Department having construed the act of 1898 to limit the acquisition of soldiers' additional rights along navigable waters to 80 rods, it is both fair and logical to say that under the fourth proviso of the act of 1903 it would have limited such entries to 160 rods along navigable waters. Congress must be presumed to have legislated with knowledge of the departmental holdings with respect to the acquisition of lands in Alaska. This being so, it follows that proviso No. (1) would be wholly unnecessary if limited to each entry and not to the acreage which could be entered in a single body by the use of soldiers' additional homestead right, etc., and if the sole purpose was to limit the proviso here under consideration to lands lying along navigable waters, and also if the sole thing in the mind of Congress was to prevent a monopolization of the water front, instead of a restriction on the use to be made of such soldier's additional homestead rights, as well as prohibiting all use of them as proposed.

The same is true of the construction of the proviso given by the district court, which appeared to find the word "entered" a stumblingblock to the Gov-

ernment's maintaining the suit. Under the Land Department construction of the act of May 14, 1898, all entries, soldiers' additional or other, were limited to 80 acres in area. (Instructions of June 8, 1898, 27 L. D. 248, particularly par. 6, p. 249; Instructions of December 4, 1902, Secretary of the Interior to Commissioner of the General Land Office, 31 L. D. 441, 442.)

If the word "entered" was intended to be considered in the narrow meaning given it by the district court, Congress need not have enacted the proviso, for any number of entries contiguous to each other away from the shore could have been made under the 1898 act, provided only each individual entry did not exceed 80 acres. There would scarcely be any point in limiting the area under each entry and it certainly would serve no purpose; nor would it have any relevancy to the proposition which was before the Senate and House conferees, namely, whether the use of soldiers' additional rights should be prohibited entirely as to lands in Alaska.

It is clear from the terms of the proviso itself, as well as in the light of the situation, both as to previous legislation and construction by the Land Department, and also in view of the legislative history of the 1903 act, that Congress meant to limit the acquisition of lands under soldiers' additional rights to 160 acres in a single body in Alaska, regardless of whether or not the entry bordered on navigable

water or arose under one or more claims of right presented by a single holder.

The affidavit that survey No. 242 was 80 rods distant from any other survey or entry under said act of Congress was misleading to the public officer in determining whether more than 160 acres were being entered by Poland in a single body. Assuming that the statute prohibited more than 160 acres being located in a single body by one person, by means of more than one application filed simultaneously based on separate assignments, this affidavit made a false statement to the public officer. It in effect stated that these tracts did not constitute a single body.

It stated as to No. 242 that it was 80 rods away from any other survey or entry applied for under said act, when it adjoined No. 241 being then applied for under said act.

Even if the separation of 80 rods was not required between these two tracts to protect the water front, as the court below decides, the affidavit asserted the separation of survey No. 242 from all other surveys and thus asserted a compliance with the limitation on the extent of single bodies permitted to be entered by the use of soldiers' additional homestead rights.

As pointed out by the dissenting opinion, this statement, if false, was a fraud on the officials; if innocent, it was a mistake of fact.

CONCLUSION.

It is respectfully submitted that the decision dismissing the bill of complaint should be reversed and the case sent back for further proceedings thereunder.

ALEXANDER C. KING,
Solicitor General.

FRANK K. NEBEKER,
Assistant Attorney General.

○

Office Supreme Court,
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No. 29

In the Supreme Court of the United States

OCTOBER TERM, 1919

THE UNITED STATES, PETITIONER,

v.

WILLIAM B. POLAND AND FREDERIC WILLIAM LOW

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF WILLIAM B. POLAND AND FREDERICK WILLIAM LOW

THE ARGUS PRESS, SEATTLE

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STATEMENT OF THE CASE

In view of the allegations of fraud contained in the amended complaint in this case, the Respondents deem it important to correct an inadvertent error in the Statement of the Case as set forth in the brief for the United States. On page two of the brief, it is stated that the affidavit alleged to contain a false statement recited that the land in question, among other things, "is more than eighty rods distant from any other survey or entry under the provisions of the Act of May 14,

1898, (30 Stat. 409) *as amended by the Act of March 3, 1903, (32 Stat. 1028).*"

The affidavit did not contain the words italicized. (R. 4.)

Comment upon this important distinction will be made in the course of the argument.

ARGUMENT

Considering the purpose of the affidavit and the actual Statute to which it referred it was neither false nor incorrect.

The defendant Poland had received from the United States a patent for the premises included in Survey Number 241, as shown upon the plat inserted between pages thirty-eight and thirty-nine of the record, being lands within the Territorial District of Alaska. Said Patent was issued January 20, 1908. (R. 4.)

On March 22, 1909, the defendant Poland secured from the United States a patent for the premises described as Survey Number 242, also shown on the plat above referred to; and for the cancellation of which patent this action was brought; no such action, however, being taken with reference to the patent for Survey Number 241.

The applications for the allowance of both entries were made at the same time. (R. 4.)

Did the defendant Poland by reason of the location and entry of these two tracts, one of which contained one hundred fifty-nine and seventy-five hundredths acres of land, and the other of which

contained one hundred and sixty acres of land, *fraudulently* acquired from the United States more than one hundred sixty acres of land by one entry in a single body as prohibited by the Act of May 14, 1898, as amended by the Act of March 3, 1903? (32 Stat. 1028.)

The respondents contend that fraud is an essential part of the case for the United States in the absence of an allegation of the return, or a tender thereof, of the consideration paid for the patent.

The act of fraud alleged in the amended complaint is that the defendant Poland at the time of the filing of his application for the entries of the tracts in question filed with the officers of the land office an affidavit which contained the following language:

> "Said tract of land (referring to the land embraced in said survey No. 242) does not exceed 160 acres in extent and is in frontage less than 160 rods along the shore of any navigable water, and is more than *eighty* rods distant from any other survey or entry under the *provisions of said Act of May 14th, 1898.*" (Italice ours.)

And that such statement was false and misled the officers of the various land departments and induced them to issue the patent for Survey Number 242.

Manifestly the statement that Survey 242 did not contain more than one hundred and sixty acres was not false. Nor is the statement that

said Survey 242 is in frontage less than one hundred and sixty rods along the shore of any navigable water false, for the plat shows that it has no frontage on any water.

But it is urged that the further statement "that it is more than eighty rods distant from any other survey or entry *under the provisions of the Act of May 14, 1898*" is false.

Is it? This brings us to the correction suggested by the respondents as to the statement of the case in the Brief for the United States. If we add to what the affidavit really says, the words italicized in our correction of the record, to-wit: "As amended by the Act of March 3, 1903," we not only fall into the same error as counsel for the United States, but we make the affidavit refer to another, and for the purposes of the question of fraud, a totally different law. Whether or not the affidavit in question was made upon a form prepared by the land office with reference to the Act of May 14, 1898, it bears upon its face most persuasive evidence that it was drawn only with relation thereto; for the act referred to places no limitations whatever upon the amount of land which may be entered by soldiers additional homestead right except as regards lands along the shore of navigable waters, and this provision is repeated as a part of the enacting clause and repeated as a proviso to sections two and ten of said act of May 14, 1898. (Supp. Rev. Stat.

Vol. 2, p. 755. 30 Stat. at L. 409.) Read as it was actually written and applied to the lands to which it referred, the affidavit is exactly true. Indeed, we do not believe that the Court will seriously consider its having been intended for any other purpose than exactly as above suggested.

The amendatory act of 1903, which is Section 101 Compiled Laws of Alaska, 32 Stat. L. p. 1028, reads as follows:

> Section 101. "That all the provisions of the homestead laws of the United States not in conflict with the provisions of this act and all rights incident thereto, are hereby extended to the District of Alaska, subject to such regulation as may be made by the Secretary of the Interior; and no indemnity, deficiency, or lieu land selections pertaining to any grant outside of the District of Alaska shall be made, and no land scrip or land warrant of any kind whatsoever shall be located within or exercised upon any lands in said district except as now provided by law; and provided further that no more than one hundred and sixty acres shall be *entered* in any *single body* by such scrip, lieu selection, or soldier's additional homestead right; provided further that no location of scrip, selection, or right along any navigable or other waters shall be made *within the distance of eighty rods of any lands, along such waters, theretofore located* by means

of any such scrip or otherwise; and provided further that no commutation privileges shall be allowed in excess of one hundred and sixty acres included in any homestead entry under the provisions hereof; Provided, That *no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims;* and that nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district; and no patent shall issue hereunder until all the requirements of sections twenty-two hundred and ninety-one, twenty-two hundred and ninety-two, and twenty-three hundred and five of the Revised Statutes of the United States have been fully complied with as to residence, improvements, cultivation, and proof except as to commuted lands as herein provided."

It will be seen that under the provisions of the Statute above quoted no location of scrip, selection, or soldier's right, *along navigable or other waters*, shall be made within the distance of eighty rods of any lands *along such waters* theretofore located by means of any such scrip *or otherwise.*

We do not find, however, any provision of the law in said section, nor has our attention been called to any provision of the law anywhere, which

prohibits an entryman from taking up land within eighty rods, or any other distance, from any other land therefore located by him, or any one else, *except along navigable waters.*

A reference to the plat at once discloses the fact that Survey No. 242 is not along any navigable or other water. (R. 33.)

We think, therefore, that we may disregard the immaterial statement referred to in the affidavit, to the effect that Survey No. 242 is more than eighty rods distant from any other survey, or entry, under the provisions of the Act of May 14th, 1898.

The maker of the affidavit, and the defendant Poland, were attempting to comply with the requirements of the Act of May 14, 1898, with reference to the location of claims along the shore and were not otherwise making reference to the relative location of the claims to each other.

As a matter of fact, read in connection with the Act of May 14, 1898, to which it refers, the affidavit is entirely accurate, for it is obvious that within the meaning of that act, i. e., along the shore of any navigable or other water, Survey No. 242 is not within eighty rods of any other entry.

It has been contended in the lower courts in the language of the Amended Complaint:

> "That the said statement was false and fraudulent in that it concealed from the officials of the Land Department of the

> United States the fact that land in excess of one hundred and sixty acres in a single body was entered by soldier's additional homestead right under the application of the said defendant, William B. Poland, in support of which application said affidavit was filed."

The plaintiff further alleges that this fraud deceived the various officers of the Government including the officials of the Land Department and the President of the United States as to the quantity of land included therein.

If these two surveys do not constitute a single entry, the statement is wholly immaterial. If, on the other hand, they do constitute a single entry, the statement is absurd on the face of the surveys, descriptions and plats. The language of the affidavit is not that the land sought by entry, under Survey No. 242, is not in excess of 160 acres, *including* the prior entry under Survey No. 241. It is, that the survey in question, No. 242, does not exceed 160 acres, which statement is true.

It has been suggested that notwithstanding the apparent purpose of the affidavit, and the reference to the Act in compliance with which it was made, yet the statement that Claim No. 242 is more than 80 rods distant from any other survey, or entry, under the provisions of said Act, might lend color to the impression in the minds of the Government officials, that Claim

No. 242 could not be a part of another entry in any event, because it was at least 80 rods distant from any other claim.

It is hard to conceive of such an idea in the mind of any Government official when we take into consideration the following language contained in the patent itself:

> "Beginning at Corner No. 1 near the North shore of Resurrection Bay, identical with Corner No. 5 U. S. Survey No. 241." (R. 9.)

(It will be noted that corner No. 1 is not on the shore.)

This is the language contained in the introductory clause of the patent, which is now sought to be annulled, and which is set forth as Exhibit "B" to the complaint herein.

In other words, this patent shows upon its face as did the survey upon which it was based, that these two location—these two claims—were identical in a common corner, and that they abut each other on a line drawn East and West.

To say that the affidavit under such circumstances, deceived the land office officials, is to accuse them of a lack of ordinary intelligence, a supposition which seems to us impossible to be entertained.

We submit therefore that the facts pleaded are wanting in an allegation of either fraud intended or exercised or relied upon.

II.

The language of the act does not prohibit two adjoining entries of separate surveys and tracts.

We submit that the language of the Act of March 3, 1903, above referred to, is not vague or ambiguous or in need of interpretation, and that only an attempt to construe it against the plain meaning of simple english has made possible the bringing of this action.

All bodies of land except such as nature divides are subject to division only by the intangible lines created by man. Whether a portion of the earth's surface is one body of land or is composed of several bodies is dependent upon human action; whether we have made such portion into several depends upon our arbitrary survey. To say that two land descriptions having a common boundary line must *ipso facto* constitute one body of land, if carried to its logical conclusion would eliminate all boundaries in many instances and make of a whole State or County one body of land. The divisions between private owners; the boundaries of states and nations are no more or less. The survey of these two tracts by the Government engineers and their separate entry by the respondent Poland; the patent by the government of first one, and a year later of the other, were all acts evidencing and confirming the creation of separate tracts.

It has been urged that the result thus contended

for, does by indirection what the statute was intended to prohibit. We submit that this position is based upon the assumption that the pleader incorporates into his argument not what the statute says, but what he *thinks* Congress proposed to do.

What the purpose of Congress was in enacting this statute might be an interesting speculation, but it does not assist in support of the argument that our entering one hundred sixty acres in each of two bodies under two separate surveys, applications and all the subsequent proceedings leading up to two patents issued more than a year, a part in time, violated the plain language of the statute in question.

In passing it may be noted that the real purpose of the bill as introduced in Congress was to extend the homestead laws in Alaska increasing the acreage which could be located by one person to three hundred twenty acres. This and the safe-guarding of the approaches to navigable waters would seem to have been the final purposes in view as shown by references to the Congressional Record set forth in the opinion of the Circuit Court of Appeals. (R. 38.)

III.

There have been no authoritative official decisions or opinions of the Land Department upon the question at issue entitled to weight before this Court.

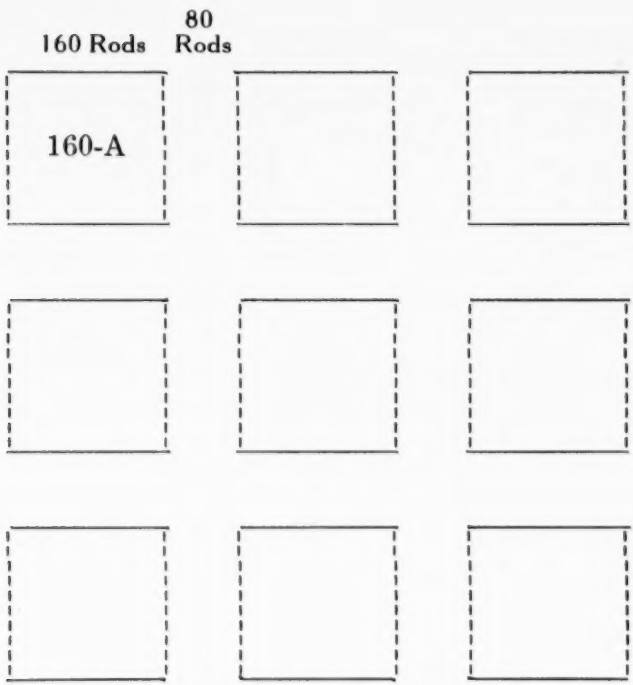
It has been urged at great length in the

court below that the Land Department of the United States has placed a construction upon the law now invoked for the cancellation of the patent in question and that such interpretation should have weight with the Courts in construing the same, and the inference follows that the language of the statute must be in need of such assistance in spite of the contention to the contrary. Indeed certain informal, and, as we think, wholly *ex parte* opinions of officers of the Land Department have been quoted in the briefs in the lower Court. The respondents are unadvised as to any official rulings of the department covering the point at issue in this case.

However, if weight is to be given to the decisions of the Land Department upon the theory that the act under consideration is in need of construction, what more persuasive decision can we obtain than the action of the Department in granting us the very patent under discussion? Indeed, the action of the Land officers of the Government not only persuade us of the good faith of the applicant in the beginning, but of the entire concurrence of the Land Department in our opinion at the time when the entries were made and the patents subsequently issued, that the entryman was clarly entitled to make the two entries alongside of each other.

The Department, when our patent was issued, agreed with our present contention.

Now, it is urged that not only is one entryman prohibited from taking up adjoining locations, but that no one can enter a location within eighty rods of any other location irrespective of its relation to navigable waters. The result of such an interpretation of the law results in the following checkerboard.



Such a procedure not only serves no useful purpose, but impairs the utility of the intervening spaces.

We think we need hardly comment further upon the effect of such a ruling if carried out to its legitimate conclusion, and applied to a territory like Alaska, almost wholly unsurveyed and having an area of over five hundred and ninety thousand square miles, with a population of one individual to every ten square miles.

On the other hand, a glance at the map instantly apprises one of the fact that access to the interior of this vast and almost untenanted domain is only possible at a very few natural harbors where the sea meets the land on anything like a level strand.

It would not appear to be necessary to say more as to the propriety of this eighty-rod reservation between claims on navigable waters, and which Congress has made a part of the law.

The contrast with reference to lands not on navigable waters and the consequent Congressional intent in plain.

Whatever weight may be attached to the long continued and established decisions of the Land Department, and we are not unmindful of the decisions of this Court thereon, yet we submit that in the instant case no such established decisions are available, the only real decision being the one in our favor when the patent was granted.

IV.

By analogy the administration of the mining laws by the department for many years supports our contention that we are within not only the letter but the spirit of the law.

The respondents are quite confident that the plain language of the statute can not be successfully attacked by seeking to interpret it in the light of a supposed public policy, even assuming that it were possible to present a convincing theory thereof.

But even if we accept that ground of debate, we submit that the established policy of the Government in an analogous statute or succession of statutes, still affords us support.

We refer to the law with regard to placer mining claims (Rev. Stat. 2330) which prohibits the location of claims exceeding one hundred sixty acres in extent by any one person or association of persons.

We think it will be admitted that the common practice of the Department has permitted adjoining claims to be located by such persons or associations in Alaska, at least prior to the Act of August 1st, 1912.

Conceding for the sake of argument, the policy of the Government to discourage the aggregation of large holdings in a few hands, we see no greater danger of monopolization in the non-mineral lands of Alaska than in the mineral lands.

Both are of vast extent and almost wholly

unoccupied. It has been contended that the necessity of discovery and location as to mineral lands might constitute a distinction as regards mining locations. But in view of the fact that the mineral belts in Alaska are of such large dimensions as to cover many square miles in continuous extent, the discovery and location consist mainly in surveying claims upon the same mineral belt.

As to the principles which in the last analysis should apply to the peculiar facts of this case, failing any sufficient allegation of fraud; we respectfully cite the opinion in the case of *Atlantic Delaine Company vs. James*, 94 U. S. p. 207. Mr. Justice Strong uses the following language:

> "Cancelling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them."

This case was quoted in the case of *U. S. vs. Maxwell Land Grant Company*, 121 U. S., p. 325; and on pages 380-381 Mr. Justice Miller uses the following language:

> "We take the general doctrine to be that

> when in a court of equity it is proposed to set aside, to annul or to correct a written instrument, for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents and other solemn evidences of title emanating from the Government of the United States under its official seal."

V.

Assuming that the granting of the patent to survey 242 resulted from a mistake of fact and law in the minds of the officers of the Land Department, but without any act of fraud on the part of respondent, Poland, we urge that the complaint is open to demurrer for want of an allegation of the return or tender of the return of the consideration paid for the entry.

If fraud were found to exist on the part of the respondents, no contention would be made that a tender is necessary. The decisions of this Court in the case of the *United States vs. Trinidad Coal and Coking Co.*, 137 U. S. 160, and the recent case of *Causey vs. the United States*, 240 U. S. 399, are conclusive upon that point. But if no fraud is found, we submit that the government

should be bound to do equity the same as any other litigant.

In this case there is no presumption that the United States sold the premises for a nominal consideration under the policy of stimulating the development of latent mineral resources, and that the real consideration to the entryman was the opportunity to profit out of the exploitation thereof.

In fact, the entryman here was the assignee of the most worthy class of citizens, who for the secrifices made for their country in time of war were granted the slight compensation involved in the land right exercised by the assignee herein. To belittle the worth of his standing is to attach the same character to that of his soldier assignor. Moreover, while the facts in this case do not come within the terms thereof insomuch as our entry had gone to patent, we desire to call the Court's attention to the Act of June 16, 1880 (21 Stat. at L. 287, Paragraph 2, Chap. 244):

> "In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be cancelled for conflict, or where, from any cause, the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same,

upon the surrender of the duplicate receipt and the execution of a proper relinqiushment of all claims to said land, whenever such entry shall have been duly cancelled by the Commissioner of the General Land Office."

Stripped of any sufficient allegation of fraud, we earnestly urge upon the Court the great injustice which the granting of the relief asked herein must inflict upon one who is thereby made the victim of a mutual mistake wherein his position has been supported by the concurring opinions of officers of the Land Department through all stages, and by the far higher authority of the Courts so far.

In view of the statute above referred to and the policy of the Government announced therein, we submit that this is far more appealing to the spirit of a Court of Equity than the ordinary rule with regard to cases involving fraud.

What the Congress has seen fit to expressly provide where theproceedings have not gone to Patent, and where the Government can withdraw of its own accord, ought not a Court of equity to require as a condition for the destruction of our position wherein we are not at fault; and more especially when the statute provides for the return of the expenses incurred, whereas we have paid those and the purchase price as well. While recognizing the principle laid down in the case of *Causey*

vs. the United States, we think the instant case distinguishable therefrom and cite from the opinion in the case of *Brent vs. Bank of Washington*, 35 U. S. 10, Pet. 596, 615:

> "Thus compelled to come into equity for a remedy to enforce a legal right, the United States must come as other suitors, seeking in the administration of the law of equity, relief, to give which, courts of law are wholly incompetent, on account of the legal bar interposed by the bank. This court, in *The United States vs. Mitchell* (9 Peters, 743), have recognized the principle in the common law that through the law gives the king a better or more convenient remedy, he has no better right in court than the subject through whom the property claimed comes to his hands. (2 Co. Inst., 573; 2 Vess., Sen., 296, 397, Hard., 60, 460.) This principle is also carried into all the statutes, by which the appropriate courts are authorized to decide, and under which they do decide on the rights of a subject in a controversy with the king, according to equity and good conscience between subject and subject. (7 Co., 19; 6 Hard, 27, 170, 230, 502; 4 Co. Inst. 190.)"
>
> "There is no reason why the United States should be exempted from a fundamental rule of equity."

The principles announced therein have not

wanted in application to cases brought to cancel land patents. This case was cited and followed in State vs. Morgan (52 Ark. 157) which held a bill in equity by which the state sought to cancel a patent, insufficient unless it offers to restore the purchase price, and in the case of *State vs. Snyder*, (66 Tex. 700) which held that the state must tender the purchase money as a pre-requisite to recovery of title.

VI.

The complaint is wanting in the necessary allegations to charge the Respondent Low with knowledge of or to subject his title to the infirmities or irregularities of the entryman's title.

The allegations of the complaint in this case set forth the transfer from Poland to Low in paragraph eight thereof, (R. 6) in language which must be conceded to admit that Low was a purchaser for value of the premises in question, subsequent to the issuance of the patent. The language is, that the Respondent Poland "conveyed, bargained, sold and confirmed * * * to the Defendent Low and to his heirs and assigns the lands in question," with a covenant of general warranty.

There is no allegation in the complaint that the Respondent Low had any knowledge whatsoever of the alleged defects in the title, or of the facts set forth in the complaint.

In the case of *U. S. vs. Detroit Timber & Lumber Co.*, 200 U. S. 321, this court held that a purchaser from an entryman was not charged with knowledge of the wrongful character of the acts of the entryman. Mr. Justice Brewer in the course of the opinion at page 331 says:

> "We do not understand the law to be as stated, or that one who enters into an ordinary and reasonable contract for the purchase of property from another is bound to presume that the vendor is a wrongdoer, and that, therefore, he must make a searching inquiry as to the validity of his claim to the property. The rule of law in respect to purchases of land or timber is the same as that which obtains in other commercial transactions, and such a rule as is claimed by counsel would shake the foundations of commercial business."

In said opinion the Court quotes with approval from *Wilson vs. Wall*, 73 U. S. 83:

> "A chancellor will not be astute to charge a constructive trust upon one who has acted honestly and paid a full and fair consideration without notice or knowledge. On this point we need only refer to Sugden on Vendors, p. 622, where he says: 'In *Ware vs. Egmonth*, 4 De G. M. & G. 460, the Lord Chancellor Cranworth expressed his entire concurrence in what, on many occasions of late years, had fallen from judges of great eminence on the subject

of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say, not only that he might have acquired, but also that he ought to have acquired it, but for his gross negligence in the conduct of the business in question. The question, then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might, by prudent caution, have obtained the knowledge in question, but whether not obtaining was an act of gross or culpable negligence'."

The Court further on page 339, says:

"It is a mistake to suppose that for the determination of equities and equitable rights we must look only to the statutes of Congress. The principles of equity exist independently of, and anterior to, all congressional legislation, and the statutes are either annunciations of those principles or limitations upon their application in particular cases. In passing upon transactions between the government and its vendees we must bear in mind the general principles of equity, and determine rights upon those principles, except as they are limited by special statutory provisions."

It is respectfully submitted that the decision

sustaining the demurrer should be sustained.

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